IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1938

JOSEPH HAUSER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner Joseph Hauser respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 21, 1979.

OPINION BELOW

The opinion of the court of appeals (App., infra, pp. 1a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1979. A timely petition for rehearing and suggestion for rehearing en banc was denied on May 30, 1979 (App., infra, p.9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

With what degree of specificity and by what standard of proof must a defendant making a due process claim of prejudicial preindictment delay, based upon actual prejudice due to the loss of material defense witnesses, establish:

(a) the nature of the lost witness's testimony and its helpfulness to the defense at trial; and

(b) that the witness would actually have testified at trial,

in order for the claim to be sufficiently ripe to warrant inquiry into the reasons for the delay.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty or property, without due process of law; * * *.

STATEMENT OF THE CASE

The Preindictment Delay

Sometime in early 1973, the Department of Justice and a federal grand jury sitting in Los Angeles, California began investigating possible criminal activity in connection with unlawful payments to labor union officials involved in union health care plans. The primary target of the investigation was Sigmund Arywitz, then Executive Secretary of the Los Angeles Federation of Labor, AFL-CIO, and former Labor Commissioner of the State of California. Other targets of the investigation included petitioner, who was an insurance salesman; Nicholas Bufalino, also an insurance salesman; and Joseph Benfatti, a local union official.

Many witnesses were interviewed by federal agents and called before the grand jury, and by the latter part of 1973 the investigation was common knowledge to those involved. In April, 1974, an attorney retained by petitioner was told by the government attorney in charge of the

investigation that an indictment would be returned against petitioner within two or three weeks. However, according to a government affidavit filed in the district court (in this case) the government did not actually begin drafting an indictment until months later, in September, 1974. Defendants in the proposed indictment included Arywitz, Bufalino and petitioner. (Joseph Benfatti, another target of the investigation, had died in June, 1974).

Over two years later, on October 28, 1976, the Los Angeles grand jury finally did return an indictment against petitioner charging the unlawful giving or offering payments and gifts to trustees of labor union health and welfare funds in violation of 18 U.S.C. § 1954. By this time, almost four years after the investigation began, and over 59 months after one of the alleged offenses had occurred,[1/] both Sigmund Arywitz and Nicholas Bufalino had died. (Bufalino died in November, 1974; Arywitz in September, 1975).

1/ The following are the dates of the offenses alleged in the indictment of which petitioner was ultimately convicted:

Count	Date of Offense	Preindictment Delay
2	November 1973	36 months
5	June to October 1972	49-53 months
7	June to December 1972	46-53 months
8	November/December 1971	59 months

The Motion to Dismiss the Indictment

Prior to trial petitioner filed a motion to dismiss the indictment on the ground that the delay between commission of the alleged offenses and filing of the indictment violated his rights under the Due Process Clause of the Fifth Amendment. In support of the motion, petitioner filed extensive documentary evidence which established actual prejudice, particularly as a result of the death and loss of testimony of Sigmund Arywitz and Nicholas Bufalino.

The principal government witnesses against petitioner were Ronald Prohaska, a trustee of the Iron Workers Union Health and Welfare Fund, and Priscilla Rowe, a former secretary to petitioner.

Petitioner's contention was that the key government witnesses were totally fabricating their testimony which incriminated petitioner and had similarly done so with respect to their testimony against Sigmund Arywitz[2/] and Nicholas Bufalino. Moreover, these witnesses linked petitioner, Arywitz and Bufalino in a criminal conspiracy involving the very charges for which petitioner alone stood trial.

2/ The factual predicate for that assertion was amply demonstrated. Petitioner lodged the prior statement of the witnesses and also specifically excerpted relevant portions of their statements which thus detailed the highly incriminatory allegations that these witnesses made against Mr. Arywitz (R.37, 39, 41-43, 45-56, 68-70).

Petitioner maintained that if Arywitz had been available as a witness, his great honesty and personal prestige would have tipped the balance in a demonstration of the falsity of these witnesses' assertions against petitioner and Arywitz.[3/]

3/There was no speculation as to the expected testimony of Arywitz. In support of the motion, the affidavit of petitioner's counsel affirmed that after being advised by the Chief Strike Force attorney that Mr. Arywitz was a primary "target" of the investigation, he observed petitioner and Arywitz together on many occasions and that it was abundantly clear that these men were the closest personal friends (Ex. A, p.2). During his lifetime, Mr. Arywitz and counsel discussed the allegations of impropriety. Mr. Arywitz adamantly denied that he ever used any influence on petitioner's behalf and also denied that petitioner ever asked him to use any influence on his behalf (ibid.). Indeed, Mr. Arywitz asserted that because he was such a close friend of petitioner's, he always avoided making any comment which would lend any suggestion that he was using influence on petitioner's behalf. (ibid.). Mr. Arywitz also denied ever receiving any money from petitioner in connection with the acquisition of any health plan business. Mr. Arywitz asserted that over the years he had extended personal loans of many thousands of dollars (by means of checks) to petitioner and had not been repaid (ibid.).

Counsel also stressed that he was aware that on December 17, 1974, Mr. Arywitz was administered and passed a polygraph test which established that in paying certain bills on his behalf, petitioner had not influenced him with respect to union related business; that he never interceded on petitioner's behalf to influence any union officers to contract for petitioner's National Prepaid Health Plan; and that over the past several years, petitioner did borrow money from him. Counsel

[cont'd following page]

Additionally, the presence of Bufalino, the person who was actually paid lawful commissions for obtaining the Ironworker's contract would have seriously impeached Prohaska and Rowe.[4/] Petitioner established the factual predicate to show that Bufalino denied these allegations of illegality during his lifetime.[5/]

The prejudice to petitioner was manifest. According to the pre-trial statements of the government witnesses, Arywitz and Bufalino were intricately involved in petitioner's alleged scheme. Indeed, the affidavit of Richard Crane, the attorney in charge of this investigation for the government during the

3/[cont'd]submitted the polygraph reports of both Arywitz and petitioner as exhibits to the motion (Ex. A). The resume of Mr. Arywitz was also attached (Ex. A).

4/As the materials supporting petitioner's motion established, Prohaska and Rowe made statements to federal investigators and to the grand jury that Prohaska was splitting Bufalino's commissions with him (See R.38, 44-45, 51, 56-58, 60-67).

5/In support of the motion, petitioner submitted the report of an investigator, hired jointly by petitioner and Arywitz in the pre-indictment stage of the proceedings. The report, dated October 2, 1974, reflects that Bufalino was the person who, acting as insurance broker, brought the Ironworkers to National Prepaid Health Plan. He acknowledged that he had received commissions, but denied that he had split the commission with Shelton or Prohaska. He also denied any knowledge of payoffs by petitioner to Shelton or Prohaska. Moreover, he informed the investigator that he had previously made similar statements to Internal Revenue Service Investigators (Exhibit F).

significant periods established the importance of these individuals. As Crane put it (R.197):

> As originally structured, the investigation and proposed indictment included three individuals among others who have since died. As originally planned, these three individuals would have been named defendants and certain transactions that transpired between them and Joseph Hauser and others would have been a significant part of the proposed charges. However, when Nicholas Bufalino died, I believe in late spring or early summer of 1974, the case had to be again restructured and narrowed. When Sigmund Arywitz died in September, 1975, the case had to be significantly restructured and narrowed.

The government's theory was that Arywitz and Bufalino were co-conspirators with petitioner.[6/] Thus, they became crucial defense witnesses. To the extent a jury would have believed their respective defenses, petitioner would have similarly benefited. By having to defend the case alone without the benefit of their exculpatory testimony, petitioner was deprived of a fair trial.

6/This was the only theory by which Arywitz or Bufalino could have been indicted with petitioner. Neither Arywitz nor Bufalino was a trustee of any trust covered under 18 U.S.C. § 1954.

Rulings Below

The district court, applying an erroneous legal standard, denied petitioner's motion without a hearing and without any inquiry into the reasons for the years of government delay. Citing this Court's decision in United States v. Marion, 404 U.S. 307 (1971), the court stated:

> I think the governing requirement is that in Marion, where the Supreme Court, as I read the opinion, requires two things conjunctively that need to be shown before an indictment is dismissed for preindictment delay; namely, intentional delay for tactical purposes and substantial prejudice.

(App., infra, pp. 13a-14a).

The district court also indicated that even if the above test were applied disjunctively, no "substantial prejudice" had been shown. (App., infra, pp. 14a-15a).[7/]

7/As this Court's opinion in United States v. Lovasco, 431 U.S. 783 (1977) makes clear, proof of "actual prejudice" renders a due process claim ripe for adjudication. It is "generally a necessary but not sufficient element of a due process claim, and ... the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." 431 U.S. at 790. There is no requirement of "substantial" prejudice as a prerequisite to an inquiry into the reasons for the delay. The extent of actual prejudice is to be considered together with length of the delay and the reasons therefor in making the determination of whether or not there has been a constitutional violation.

The court of appeals affirmed on the ground that petitioner failed to satisfy the requirement that proof of prejudice "must be definite and not speculative," citing its prior decision in United States v. Mays, 549 F.2d 670, 677 (9th Cir. 1977). The court said that it was "highly speculative" that the deceased witnesses would have stood trial themselves or elected to testify. (However, no reason was given as to why this was so, and none appears in the record). The court also indicated that "if they had testified, the substance of their testimony, and hence its impact upon appellant's defense, was unknown." (App., infra, p. 3a). (In light of the evidence submitted in support of petitioner's motion, it is difficult to understand the basis for this conclusion). Finally, the court held that "[b]ecause appellant has failed to show actual prejudice, his claim of preindictment delay was not ripe for adjudication ... and we need not address his contention that he was constitutionally entitled to an evidentiary hearing on the reasons for the delay ...." (App., infra, p. 7a).

REASONS FOR GRANTING THE WRIT

This case presents the following important constitutional question: How extensive must a showing of "actual prejudice" be in order to ripen a due process claim of preindictment delay so as to require an inquiry into the reasons for the delay.

We submit that the standard of "substantial prejudice" applied by the district court and approved by the Ninth Circuit in this case is erroneous and almost impossible to achieve. Under such a standard virtually no claim will be found ripe for adjudication, and inquiry into the reasons for government delay will almost never be made. The protection against deliberate or grossly negligent prosecutorial delay will thereby be written out of the Constitution.

Obviously, when a potential witness has died prior to trial, it can never be stated with absolute certainty that he would have testified, or precisely what his testimony would have been. But when, as in the present case, the deceased witness was a close associate of the defendant, whom the government intended to charge as a co-conspirator in the very acts charged against the defendant, who adamantly denied any wrongdoing and went so far as to hire an investigator and to take a polygraph test to clear his name, it is not mere "speculation" to suggest that if he had survived he would have been able and most willing to offer favorable testimony at trial. "Actual prejudice" within the meaning of United States v. Marion, supra, and United States v. Lovasco, supra, was clearly demonstrated in this case. Accordingly, inquiry into the reasons for the delay should have been made.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit.

Respectfully submitted,

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June 1979

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed Mar 21, 1979]

UNITED STATES OF AMERICA Plaintiff-Appellee,	)	No. 77-2069
v.	)	
JOSEPH HAUSER, Defendant-Appellant.	)	MEMORANDUM

Appeal from the United States District Court for the Central District of California

Before: BROWNING and ANDERSON, Circuit Judges, and NIELSEN*, District Judge

Appellant Joseph Hauser was convicted under 18 U.S.C. § 1954 of giving or offering payments and gifts to induce trustees of union health and welfare funds to do business with companies appellant controlled.

Appellant's principal contention is that the district court erred in denying a motion to dismiss the indictment because of delay between the commission of the alleged offense and the initiation of prosecution. See United States v. Marion, 404 U.S. 307, 323-25 (1971); United States v. Lovasco, 431 U.S. 783 (1977); United States v. Mays, 549 F.2d 670 (9th Cir. 1977).

*Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

The last of the charged offenses occurred in November 1973. Appellant asserts the government "had its case 'in hand' " by June 4, 1974, (Reply Brief at 23), when Priscilla Rowe, one of the government's two principal witnesses, testified before the grand jury. However, the indictment was not returned until October 28, 1976. Appellant claims prejudice because three potential witnesses for the defense died during this interval -- Joseph Benfatti, who died June 27, 1974; Nicholas Bufalino, who died November 2, 1974; and Sigmund Arywitz, who died September 4, 1975.

The possible testimony of the decedents would have had no significant relationship to two of the counts, [two and eight], upon which appellant was convicted; and as to these counts loss of the testimony therefore was not prejudicial. Under the concurrent sentence rule, conviction on these counts is sufficient to sustain the prison sentence of 30 months and half of the $40,000 fine. However, because an additional fine of $10,000 was imposed on each of the remaining two counts, the merits of appellant's contention with respect to these counts must be reached.

The impact of Benfatti's unavailability at trial need not be considered. He died within two weeks of the date appellant selects as that upon which the government had sufficient evidence to ob-

tain the indictment, and thus long before trial of a case of complexity could have occurred.

Appellant made a showing that Bufalino and Arywitz were subjects of the irvestigation that lead to appellant's indictment. Appellant also showed that during the investigation the government's principal witnesses (Rowe and Prohaska) had accused the two decedents of participating in the wrongful activity, and that the decedents had denied any wrongdoing. Appellant argues that if the two had lived they would have been indicted with appellant, that as codefendants at a joint trial they would have testified that the accusations against them by Rowe and Prohaska were false, and that this testimony would have undermined the credibility of Rowe and Prohaska as witnesses against appellant.

Appellant's showing failed to satisfy the requirement that proof of prejudice "must be definite and not speculative," United States v. Mays, supra, 549 F.2d at 677.[1/] Assuming decedents had been indicted, it is highly speculative that they would have stood trial. It is equally speculative that they would have elected to testify. If they had testified, the substance of their testimony, and hence its impact upon appellant's defense, was unknown. See id. Appellant showed only that the decedents had denied any wrongdoing. This showing afforded no basis for judging how important the

unavailability of decedents' testimony might have been in undermining the credibility of Rowe and Prohaska. Arywitz was also reported to have said that appellant was an honest man, but, on the facts of this case, the loss of a bald statement as to appellant's honesty was not prejudicial. Bufalino told a private investigator that Prohaska had threatened to tell authorities of the alleged wrongdoing unless restored to his job by the union, but this alleged threat would have added little to the mass of evidence of Prohaska's bias offered and admitted at trial.

Appellant contends that the indictment should have been dismissed because the prosecutor failed to inform the indicting grand jury that Prohaska and Rowe had admitted giving false statements to a prior grand jury. The prosecutor made the transcripts of the witnesses' prior grand jury testimony available to the indicting grand jury, but did not explicitly inform the grand jury of the witnesses' prior inconsistent statements. As the trial court pointed out, the better course would have been for the prosecutor to do so. On the facts of this case, however, the prosecutor's dereliction does not warrant dismissal of the indictment. An indictment need not be dismissed "because the government did not produce before the grand jury all evidence in its possession tending

to undermine the credibility of the witnesses appearing before [it]." Loraine v. United States, 396 F.2d 335, 339 (9th Cir. 1968). See also Jack v. United States, 409 F.2d 522, 523-24 (9th Cir. 1969). "Dismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant was. . . ." United States v. Thompson, 576 F.2d 784, 785-86 (9th Cir. 1978). See also United States v. Chanen, 549 F.2d 1306, 1309 (9th Cir. 1977). The transcripts of the earlier grand jury proceedings were in the possession of the indicting grand jury for at least three months prior to the return of the indictment. There is no suggestion that the prosecutor sought in any way to deprive the indicting grand jury of an opportunity to exercise its independent judgment with respect to the material contained in the transcripts. Moreover, in this case, as in Loraine, Thompson, and Jack, all of the impeaching material was fully presented to the jury at trial.

Appellant claims that the trial court improperly restricted closing argument by instructing counsel not to refer to evidence relating to two counts on which the court had entered judgments of acquittal. Appellant contends that comment on this evidence was required to restore appellant's general credibility.

The court cautioned the jury that it was not to consider the testimony offered on the two dismissed counts for the purpose of deciding appellant's guilt or innocence on the remaining counts. See generally United States v. Amaro, 422 F.2d 1078, 1081 (9th Cir. 1970). The offenses charged in the dismissed counts were sufficiently independent of those charged in the remaining counts that the jury could follow the court's instructions without difficulty. Indeed, there was reason for the court to believe that appellant's counsel wished to comment on the dismissed counts for the very purpose of using the weakness of the evidence to influence the jury's assessment of appellant's guilt or innocence on the remaining counts (see T.R. 1432). Cf. United States v. Masterson, 529 F.2d 30, 32 (9th Cir. 1976). "The trial court has broad discretion in controlling the scope of closing argument." United States v. Masterson, 529 F.2d 30, 32 (9th Cir. 1976). See generally Herring v. New York, 422 U.S. 853, 862 (1975). The court did not abuse its discretion in this instance.

Finally, we have examined the record and are satisfied that the evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that the offense charged in count eight occurred within the limitations period.

Affirmed.

FOOTNOTES

1. Because appellant has failed to show actual prejudice, his claim of preindictment delay was not ripe for adjudication, United States v. Lovasco, supra, 431 U.S. at 789-90, and we need not address his contention that he was constitutionally entitled to an evidentiary hearing on the reasons for the delay. See United States v. Mays, supra, 549 F.2d 678.

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed Apr 12, 1979]

UNITED STATES OF AMERICA)
vs)
JOSEPH HAUSER)

No. 77 - 2069

ORDER EXTENDING TIME TO FILE A PETITION FOR REHEARING

and

ORDER STAYING THE MANDATE OF THIS COURT

Upon due consideration by the Court of the Defendant/Petitioner Joseph Hauser's Motion to Extend Time for Filing a Petition for Rehearing and Motion to Stay the Mandate of the Court pending final disposition of the Petition for Rehearing and the Affidavit of his Counsel, David Eric Brockway;

IT IS HEREBY ORDERED that the Petitioner Joseph Hauser shall have until and including the 24th day of April, 1979 to file a Petition for Rehearing of the above entitled matter before this Court and that the Mandate of the Court is Stayed pending final disposition of the Petition for Rehearing and pending further order of this Court.

Dated: 4/12, 1979

/s/ James R. Browning

JUDGE FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed May 30, 1979]

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSEPH HAUSER, Defendant-Appellant.	No. 77-2069 ORDER

Before: BROWNING and ANDERSON, Circuit Judges, and NIELSEN, * District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*Honorable Leland C. Nielsen, United States District Judge, Southern District of California, sitting by designation.

LOS ANGELES, CALIFORNIA, FRIDAY, JANUARY 14, 1977; 1:30 P.M.

- - -

THE COURT: All right. We will continue with the undecided motions.

I would like to take up next the Hauser motion to dismiss the indictment because of pre-indictment delay, with an accompanying request for an evidentiary hearing and supplemental discovery. That motion was filed December 20th, and is for the benefit of all three defendants.

The Government's response was filed the 4th of January. Attached to the Government's response are affidavits from a number of Government lawyers, Messrs. DeFeo, O'Malley, Twitty and Crane.

There is no affidavit whatsoever raising any factual issue that accompanies the motion papers. There is only a general and undocumented assertion that while the case was under investigation three people died, Messrs. Arywitz, Bufalino and Benfatti, who are argued as being necessary to the defense.

Mr. Rosenfield --

MR. ROSENFIELD: Yes, your Honor. I would like to call the Court's attention to my affidavit which has been filed pertaining to this motion.

THE COURT: I may have missed it. Where is it?

MR. ROSENFIELD: Thank you, your Honor.

THE COURT: Hold on.

MR. ROSENFIELD: It's Exhibit A, your Honor.

THE COURT: You have some very lengthy references to grand jury testimony. Is that what you are talking about?

MR. ROSENFIELD: Your Honor, I am referring specifically to the affidavit of Richard L. Rosenfield filed with the Exhibit A attached to the motion. I filed --

THE COURT: Hold on, please. Just hold on.

What page of the motion papers is that?

MR. ROSENFIELD: It is not in the motion papers. Your Honor, I filed with the Court two pages, if your Honor has these in front of you --

THE COURT: No, sir, I do not.

(Counsel and clerk conferring.)

THE COURT: You are holding a sheaf of papers that must weigh seven or eight pounds and that are three inches thick.

MR. ROSENFIELD: I would say that that basically is correct, your Honor. I filed with the Court --

THE COURT: Well, I have no idea what this is. The clerk has just handed to me the document lodged December 20th. It just says "Exhibits."

MR. ROSENFIELD: It was my understanding -- while I physically did not file the papers in this case, I prepared for filing with the Court, and was under the assumption that

it was filed with the Court -- I could certainly check with my office and the person that filed them --

THE COURT: Well, is this the document? Come up and look.

MR. ROSENFIELD: Thank you, your Honor. It looks familiar.

THE COURT: If so, is it mentioned in the motion?

MR. ROSENFIELD: Yes, your Honor. That is one-half of the document lodged with the Court.

THE COURT: Where is the rest?

MR. ROSENFIELD: I don't know, your Honor.

THE COURT: Well, you see the problem arises, Mr. Rosenfield, from the fact that you have not labeled a separate document, you understand, with a separate back as an exhibit to anything. You just said "Exhibits."

MR. ROSENFIELD: What I have, your Honor, I lodged with the Court two packages of exhibits, one marked Part 1 and one marked Part 2.

THE COURT: Yes; without saying to what they are exhibits. This, as far as I know from looking at the cover, could deal with the trial.

MR. ROSENFIELD: Your Honor, other than that, in my motion, and in each of my motions, I refer specifically to exhibits in each instance that I have cited testimony or that I have made --

THE COURT: Hold on. I see what you are talking about.

MR. ROSENFIELD: There is also a table of contents to the exhibits, your Honor.

THE COURT: Wait just a second.

MR. ROSENFIELD: I am sorry.

THE COURT: We have to find the other package.

Well, all right. I now have the other packet. Let me go ahead. Now, if you will be seated -- well, you might answer this, though, before you do: Do you make any claim or showing that there was any deliberate delay in indictment for the purpose of gaining tactical advantage?

MR. ROSENFIELD: I make an allegation -- your Honor, I have no specific way of demonstrating other than through cross-examination of witnesses --

THE COURT: Very well.

MR. ROSENFIELD: That there was intentional delay. I will concede to the Court that on the state of the record, without the benefit of an evidentiary hearing, I can't make that assertion supported by any evidence.

THE COURT: Now, I know that there is some uncertainty about the law in this area. I have looked at this problem before in other cases, and I don't think the law is very difficult to state or ascertain. I think the governing requirement is that in Marion, where the Supreme Court, as I

read the opinion, requires two things conjunctively that need to be shown before an indictment is dismissed for pre-indictment delay; namely, intentional delay for tactical purposes and substantial prejudice.

I am aware that the Ninth Circuit on at least one, and maybe more occasions, has used the disjunctive as to these two items, and on a number of other instances has used the conjunctive, the Marion language exactly. The most recent authority is one pointed out by the Government, Cordova, which apparently uses the conjunctive, and that is the standard that I would intend to employ.

But even if one uses the disjunctive, it would appear to me that neither element is shown here. The indictment, as now before me, Counts Two through Eight, charges in each count a specific illegal payment to a specific defendant of a specific amount or thing of value to influence his actions. I heard the testimony as to a number of the Shelton items in the Shelton income tax case. The Government says the testimony will be the same on the items that were involved; and the evidence, as I recall, in that case did not include any mention by either side of any of these three persons, the decedents. And the Government says that the Government's evidence will not include any reference to those three decedents.

Am I right about that, Mr. Lord?

MR. LORD: Yes, your Honor.

MR. SHERIDAN: I would have to disagree in part, your Honor, there was no such evidence as such --

THE COURT: Well, I will let you in a minute.

The only claim of prejudice that I can see in these papers is that the dead men could impeach the testimony of Prohaska and Rowe. But I gather -- and I'll let Mr. Rosenfield correct me -- that the impeachment would be on a greatly collateral matter; and, as the Government points out, there are all kinds of direct impeachment of both of those witnesses available to the defense, which impeachment was extensively used in the Shelton income tax trial.

So, Mr. Rosenfield, we will let you speak first. How are you possibly prejudiced by the death of these people, in view of the specificity and nature of these charges?

MR. ROSENFIELD: I think by a hypothetical I could point out to the Court that that is not a correct position that the Government is taking, and it is this: The issue of prejudice to a defendant is determined by what exculpatory witness he has lost. For instance, let's take a situation where you have a robbery and the Government's witness contends that A and B committed the robbery, and that A died --

THE COURT: Excuse me a second.

(Court and clerk conferring.)

THE COURT: Go ahead.

MR. ROSENFIELD: And that A has since been deceased,

and we assume an unreasonable delay. Or, assume in any alibi witness case, the mere fact that the Government does not in its case in chief intend to introduce evidence of the alibi, or that there is a defense, does not go to the issue as to whether the defendant was prejudiced by the loss of a witness in this case.

THE COURT: Well, just a second, please.

You have not in the papers I looked at told me what you intend to prove, what you would have hoped to prove if the dead men were alive. What is it?

MR. ROSENFIELD: Well, we are talking about three dead men. And I would like to state for the record that the Government has stipulated to the deaths and the date of the deaths as we put them in the motion.

What we would intend is this: The gist of the Government's case stems from the testimony -- on the most major counts in particular, the counts pertaining to the Shelton matter -- the testimony of Prohaska and Rowe. If they were allowed to testify, and if Arywitz were allowed -- well, Arywitz is dead. Their testimony will be that Mr. Hauser bribed Mr. Shelton, that he bribed Mr. Schwartz. That is going to be the testimony of the Government witnesses.

It is the defense contention that that is utter fiction and that these witnesses, for their personal reasons, are not being truthful.

THE COURT: Will you just answer my question. Time is short.

MR. ROSENFIELD: Okay. The point is, your Honor, I think it is important to understand the context in which this comes up.

If Mr. Arywitz were alive -- and we detail it through my affidavit, we detail it through polygraph examination, and the supporting exhibits that I filed, that if Mr. Arywitz were alive -- we know that before his death he denied vehemently the gist of the contentions made by the Government witnesses. If Mr. Arywitz were alive, because of the --

THE COURT: Please, Mr. Rosenfield. It is, as I indicated originally, is it not, impeachment of those two critical witnesses on a collateral matter. These charges do not involve any charge of bribing Arywitz or any of the other decedents, do they?

MR. ROSENFIELD: Well, your Honor, I would suggest to the Court that it is not collateral --

THE COURT: Isn't that correct?

MR. ROSENFIELD: Your Honor, I am answering the question. I would object --

THE COURT: Well, first answer it yes or no, and then I will let you explain.

MR. ROSENFIELD: It is not correct that it is a collateral matter, your Honor.

THE COURT: Do these charges -- I looked at the indictment -- involve a charge of bribing either Arywitz or any of the other decedents?

MR. ROSENFIELD: They do not.

THE COURT: Okay. Now, you can answer.

MR. ROSENFIELD: Thank you.

Your Honor, it is the defense contention that if a witness can fabricate that A and B were both involved in a scheme, and A is deceased, and A would have denied that he was involved in the scheme, that is not collateral impeachment. What is not as important impeachment is the impeachment that was conducted in the Shelton trial, that is, to show bias and motive.

We want to be able to demonstrate -- and I believe Mr. Hauser lost his best witness when Mr. Arywitz died, because he lost the ability to have someone get on the stand and say, and have that jury believe, that Prohaska and Rowe were capable of fabricating a story that put Mr. Arywitz into the --

THE COURT: I understand the position now. Thank you.

Now, Mr. Sheridan, what is the factual situation as you recall the income tax trial?

MR. SHERIDAN: There was just one reference in the very early stages of the Shelton tax case, your Honor, when Mr. Lord made his opening statement, he has a sum in the opening statement of $4500, that, after we made our objection, the

Court agreed with us in limiting what the proof was. The $4500, as I understand it, supposedly was based upon testimony of Mr. Prohaska that commissions were paid by NPHP to one of the decedents, and he split the commission, and some went to Mr. Prohaska; and Mr. Prohaska gave it to Darrel Shelton.

THE COURT: Do you remember the opening statement as mentioning any of these three decedents' names?

MR. SHERIDAN: Names were not mentioned, your Honor.

THE COURT: Okay. That is my understanding.

MR. SHERIDAN: The amount of money was mentioned, the $4500, and that's where it came from. But I understand -- and Mr. Lord has turned it over -- that they did interview, for instance, Mr. Bufalino, and so on. Commissions were in fact paid. But no split of the commission. No money went to Mr. Prohaska.

THE COURT: All right. Let me hear from the Government now.

I understand Mr. Rosenfield's argument to be that the death of these decedents deprived him of some witnesses who could impeach your key witnesses as to charges that they made against those decedents, charges not involved in this case.

Do you understand his argument to be that?

MR. LORD: I believe I do, your Honor.

THE COURT: But charges tolled contemporaneously with

and perhaps even as a part of the same investigation as the charges that are the subject of this case. Correct?

MR. LORD: That is correct.

THE COURT: Well, what do you say to that?

MR. LORD: Well, your Honor, my argument is what the Court has stated with respect to that, that it would be collateral impeachment of that witness.

We have stated in our response, and I state to the Court at this time, that the Government will not offer any evidence unrelated to the specific allegations in this indictment. There is no allegation by a defendant that any of those individuals were present at the time of the alleged payments of money and gifts of value. There is no allegation that they were involved whatsoever in the payments alleged.

Their only argument is that because Priscilla Nowe and Ron Prohaska did incriminate those three decedents by saying that they received payoffs, they are saying that they would call these witnesses to testify that they didn't receive payoffs. That's collateral, immaterial.

THE COURT: All right. No further argument is necessary. The motion is denied in all respects. If during the trial any facts are demonstrated that impel the defendants to raise the same matters post-trial, if a conviction occurs, the Court can take another look at it.

Now, I go to the defense motions to dismiss the

indictment due to prosecutorial misconduct before the grand jury. This motion was filed on December 20th; response was filed January 4; and the reply was filed on January 10th.

Maybe I missed it again, but this motion is not backed up by any affidavits. Am I right about that?

MR. ROSENFIELD: That is correct again, your Honor. It is backed up by the exhibits that we have lodged to demonstrate what was said to the grand jury. I want the Court to be aware of that. Each time I made a reference to grand jury testimony, IRS statements, or anything else in any of my motions, I supplemented it by that package of exhibits.

THE COURT: Well, as I gather, some of the facts are not disputed.

The Government does not dispute the accuracy, I take it, of these voluminous exhibits, any extracts from any grand jury testimony, et cetera.

MR. LORD: Oh, no. No; not as to the accuracy of the transcripts as set forth in the motions.

THE COURT: I want the record to indicate what is apparent to all of you, that I know a good deal more about the factual background underlying this motion than a judge would ordinarily know because I did preside at the income tax trial of Mr. Shelton, where the witness Prohaska was cross-examined at great length about his prior inconsistent and